89-1085

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

SAM SEXTON, JR.,

Petitioner

v.

ARKANSAS SUPREME COURT COMMITTEE ON PROFESSIONAL CONDUCT,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

At issue is the question of whether or not attorney disciplinary proceedings adopted by the Supreme Court of the State of Arkansas stand Constitutional muster. The Supreme Court of Arkansas delegates to an appointed committee the power to suspend attorneys from the practice of law. The Committee is empowered to judge both issues of law and fact and to review its own decisions. The questions presented are:

1. Whether the due process requirement of the Fourteenth Amendment of the United States Constitution is offended by an attorney disciplinary procedure whereby an appointed committee, without a hearing, imposes sanctions against an attorney and thereafter designates itself as a hearing tribunal to conduct a public hearing in which it reviews its previous decision.

2. Whether the "fair warning" requirement of the Due Process Clause of the Fourteenth Amendment of the United States Constitution is applicable to attorney disciplinary proceedings in which the Respondent Committee may convict an attorney upon a finding of a "reasonable cause to believe" that the attorney has violated a disciplinary rule.

PARTIES TO THE PROCEEDING

All parties to this proceeding are identified in the caption.

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OPINIONS BELOW

The opinion of the Arkansas Supreme Court is reported at 774 S.W.2d 114 (Ark. 1989). This proceeding had previously been before the Arkansas Supreme Court on a Petition for Prohibitory and Other Relief and was reported at 294 Ark. 154A, 761 S.W.2d 602 (1988). The case had also been before the Arkansas Supreme Court in another appeal reported at 295 Ark. 141, 747 S.W.2d 94 (1988).

JURISDICTION

The judgment of the Arkansas Supreme Court was entered on September 12, 1989. The Court's jurisdiction is invoked under 28 U.S.C. Section 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Due Process Clause of the Fourteenth Amendment of the United States Constitution (U.S. Const. Amend. XIV, Section 1) which provides: "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal

protection of the laws."

STATEMENT OF THE CASE

Petitioner has been a member of the Arkansas Bar since 1954. In 1983, he entered into a transaction with a person (named Danny Haffelder), who was determined by the Arkansas Supreme Court to have been a client of the Petitioner. The transaction, which was an investment, was in writing, and the client was given a copy of the written agreement several days before the transaction was consummated. Prior to entering the transaction, the client was advised to consult outside legal counsel concerning the transaction and was advised of certain risks involved in the transaction.

In early 1987, the Respondent Arkansas Supreme Court Committee on Professional Conduct notified the Petitioner that he had been charged with violation of Rule 1.8 of the Model Rules of Professional Conduct in connection with the transaction. Following a hearing, the Petitioner was suspended in connection with the transaction. The Arkansas Supreme Court reversed the suspension because the ethical rule which the Petitioner was convicted of was not enacted until 1985, two years after the transaction occurred. *Sexton v. Supreme Court Committee on Professional Conduct*, 295 Ark. 141, 747 S.W.2d 94 (1988).

The Committee then modified the charge against

the Petitioner to a violation of DR 5-104(A) of the Code of Professional Responsibility, the ethical rule in effect at the time of the transaction.[1] Prior to the hearing, the Petitioner sought prohibitory relief and mandamus to compel the Committee to transfer the case to the Circuit or Chancery Court (trial level courts) of the Petitioner's home county. These requests were denied as the matters could be properly addressed on appeal. *Sexton v. Supreme Court Committee on Professional Conduct*, 294 Ark. 154A, 761 S.W.2d 602 (1988).

The Respondent Committee then held a hearing. Because the rules applicable to the Committee require the Committee to vote to take ethical action against attorney accused of rule violations prior to holding a hearing, the Petitioner asked, by motion, each member of the Committee who had previously made a decision by ballot to recuse. This request was denied.

The rules of the Committee provide that the Committee may suspend an attorney, on its own vote, if there is a "reasonable ground to believe" that an attorney has violated an ethical rule. Following a hearing the Petitioner was suspended by the Respondent Committee.

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[1]This rule was superseded in July, 1985 by an appropriate order of the Arkansas Supreme Court. (Rule 1, Rules of the Court Regulating the Professional Conduct of Attorneys at Law.)

Following the ruling of the Committee, the Petitioner asked the Committee to make findings of fact and conclusions of law. This request was denied.

Although no provision in the rules applicable to the Committee is made for appeal, the case was appealed to the Arkansas Supreme Court. On appeal, the Arkansas Supreme Court affirmed the decision. *Sexton v. Supreme Court Committee on Professional Conduct*, 774 S.W.2d 114 (Ark. 1989).

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

SAM SEXTON, JR.,

Petitioner

v.

ARKANSAS SUPREME COURT COMMITTEE ON PROFESSIONAL CONDUCT,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

PETITION FOR WRIT OF CERTIORARI

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Sam Sexton, Jr., respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Arkansas Supreme Court, entered in this proceeding on September 11, 1989.

REASONS FOR GRANTING THE WRIT

I.

THE ARKANSAS SUPREME COURT COMMITTEE ON PROFESSIONAL CONDUCT VOTES TO TAKE ETHICAL ACTION AGAINST AN ATTORNEY BEFORE ANY HEARING AND REVIEWS ITS OWN DECISION AT A HEARING HELD FOR THE ACCUSED ATTORNEY

The petition presents an issue of crucial significance to attorneys involved in disciplinary proceedings. The Court has previously determined that attorney disciplinary proceedings are quasi-criminal proceedings. *In re Ruffalo*, 390 U.S. 544 (1968). Any discipline imposed in attorney disciplinary proceedings is a penalty imposed upon the affected attorney. *Charlton v. Federal Trade Commission*, 177 U.S. App. D.C. 418, 543 F.2d 903 (1976); *Razatos v. Colorado Supreme Court*, 746 F.2d 1429, 1435 (10th Cir. 1984). The protections of the Due Process Clause of the Fourteenth Amendment of the United States Constitution apply to proceedings involving attorney discipline. *Willner v. Committee on Character and Fitness*, 373 U.S. 96 (1963).

Petitioner has been a member of the Arkansas Bar since 1954. In 1983, he entered a transaction with a person determined by the Arkansas Supreme Court to be a client of Petitioner. The transaction consisted of an investment by the client in a corporation in which

Petitioner was an officer. The client was advised to seek outside legal counsel regarding the transaction and was advised of certain risks in the transaction.

In early 1987, a disciplinary proceeding was instituted against the Petitioner for violating Rule 1.8(a) of the Model Rules of Professional Conduct in connection with the transaction by the Respondent, Arkansas Supreme Court Committee on Professional Conduct (hereinafter "Committee"). Petitioner was ultimately suspended by the Respondent Committee. That suspension was, however, reversed by the Arkansas Supreme Court because the rule with which petitioner was charged with violating was not enacted until 1985. *Sexton v. Supreme Court Committee on Professional Conduct*, 295 Ark. 141, 747 S.W.2d 94 (1988).

The Respondent Committee thereafter modified the charge against Petitioner to a violation of DR 5-104(A) of the Code of Professional Responsibility, the rule in effect in Arkansas in 1983. Prior to holding any hearing on the charge, the Respondent Committee had voted, by ballot, to suspend the law license of the Petitioner. There is no doubt that the vote was taken in the present case as the applicable rules require a vote. *Sexton v. Arkansas Supreme Court Committee on Professional Conduct*, 774 S.W.2d 114, 119 (Ark. 1989). The rules applicable to the Committee proceedings (Rules of the Court Regulating Professional Conduct of Attorneys at Law) provide for a vote to be taken prior to

a hearing on charges against an attorney. If the Committee votes to take action against an attorney, the attorney can then request a hearing. In this case, Petitioner did request a hearing.

At the hearing of this matter, Petitioner sought recusal of the members of the Committee who had voted by ballot to take action against him. Every member of the Committee who had previously voted elected to review his or her previous decision rather than recuse.

The Court has denounced those proceedings in which the fact finder sits in review of his or her previous decision as offending the Due Process Clause of the Fourteenth Amendment of the United States Constitution. *Gagnon v. Scarpelli*, 411 U.S. 778 (1973); *Morrisey v. Brewer*, 408 U.S. 471 (1972); *Withrow v. Larkin*, 421 U.S. 35, 59 n. 25 (1975). A fair trial in a fair tribunal is a basic requirement of due process. *In re Murchison*, 349 U.S. 133 (1955). When the Committee, which is both finder of fact and law, is required to review its previous vote by ballot and determine that it was wrong in order to find the affected attorney not guilty of a rule violation, a fair trial appears impossible. The Committee has prejudged the issue and made a decision before there is a hearing.

Every procedure offering a possible temptation "not to hold the balance nice, clear and true" denies due process. *Tumey v. Ohio*, 373 U.S. 510 (1927). The

constitutional question is not one of actual bias, but simply whether the average judge would be tempted. *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986). The rules utilized by the Respondent Committee include the Rules of the [Arkansas] Supreme Court Regulating the Professional Conduct of Attorneys at Law.

These rules, adopted by the Arkansas Supreme Court, specify certain duties of the Respondent Committee and give the Committee its jurisdiction. The Committee is authorized to take action, including suspension, of an attorney from practice, or to prepare a complaint and file the complaint in the Circuit or Chancery Court (trial level courts) in the district in which the attorney resides. It is only the Respondent Committee which has the right to decide whether it will review the previous decision or file a complaint in the court against the attorney. The rules do not require that the Committee make available to the accused attorney the results of its investigation, any memoranda submitted by the executive secretary, or any other material except the affidavit of the complainant. The rules do allow a hearing. But the hearing is one in which the Committee, which has already made its determination as to guilt or innocence, may designate itself as the hearing tribunal to review its decision previously made.

The opinion of the Arkansas Supreme Court in affirming the case allows the fact finder to express an opinion, vote as to that opinion with a binding result

unless a hearing is requested, and to review that decision when a hearing is held. If this procedure is allowed to stand in attorney disciplinary proceedings, it could certainly be utilized in all area of administrative law. For these reasons, both attorneys and the public alike have an interest in having the case decided by the Court.

II.

ATTORNEYS ARE ENTITLED TO FAIR WARNING AS TO WHAT CONDUCT IS PROHIBITED AT THE TIME THE CONDUCT OCCURS AND SUBSTANTIAL EVIDENCE TO SUPPORT THE CHARGES AGAINST THE ATTORNEY

After holding the hearing on the charges against the Petitioner, the Respondent Committee found Petitioner guilty of violating DR 5-104(A) of the Code of Professional Responsibility. The Committee, which has the direct power to suspend, suspended the law license of the Petitioner. Petitioner requested the Committee to make findings of fact and conclusions of law, but this request was declined.

Although the rules make no provision for an appeal from decisions of the Respondent Committee, an appeal to the Arkansas Supreme Court was effected. The Arkansas Supreme Court, affirming the action of the Committee, for the first time determined that DR 5-104(A) in its "full disclosure" provision required: (1) a

full explanation of the divergence in interest between the lawyer and the client; (2) an explanation about the need to seek independent legal advice; and (3) a detailed explanation of risks and disadvantages to the client which flow from the agreement. *Matter of Neville*, 147 Ariz. 106, 708 P.2d 1297 (1985), was the only case cited for the proposition. *Neville*, however, was decided two years after the transaction had occurred. The pre-1985 decisions on the construction of DR 5-104(A) held as did the courts in *In re Bartlett*, 283 Or. 487, 584 P.2d 296 (1978), and *Committee on Professional Ethics v. Mershon*, 316 N.W.2d 895 (Iowa 1982). In both cases, the courts held that an attorney complied with DR 5-104(A) by advising his client to seek outside counsel concerning the transaction. Those cases were relied upon by the Petitioner.

It is settled that an act of judicial construction cannot retroactively bring conduct within the realm of a penal statute to prohibit conduct that is not within the scope of the statute on its face. *Bouie v. Columbia*, 378 U.S. 347, 352 (1964); *Lanzetta v. New Jersey*, 306 U.S. 451 (1930). Due process requires notice that an act is punishable at the time it is committed. *In re Inquiry Concerning a Judge*, 357 So.2d 172 (Fla. 1978). In the present case, the Petitioner had no warning or notice that the "full disclosure" requirement of DR 5-104(A) required more than disclosing all terms, advising the client that risks were involved, and advising the client to seek outside legal counsel at the time his conduct

occurred.

The Committee's actions in declining to make findings of facts and conclusions of law, when so requested, specifically offends due process. Petitioner requested the Committee to make findings of fact and state conclusions of law. The Respondent Committee refused to do so and refused to state any factual or legal basis for its order of suspension. In another context, this Court has held that "due process" requires the fact finder to state the facts upon which its decision is founded and to state the reasons (or conclusions of law) which support the action taken. *Wolff v. McDonnell*, 418 U.S. 539, 563 (1974). The reason for such requirement is to permit adequate Court review of the action taken. *Id.*, 418 U.S. at 565. If due process requires such findings of fact and conclusions of the reasons for disciplining convicted felons, it would seem that the requirement could not be less for attorneys, whom the Court considers to be first class citizens. *Spevack v. Klein*, 385 U.S. 511 (1967).

The rules applicable to the Respondent Committee require, in order to discipline an attorney, that the Committee find that there is a "reasonable ground to believe" that the attorney has committed an ethical violation. Rule 7(A) of the Rules of the (Arkansas Supreme) Court Regulating Professional Conduct of Attorneys at Law. An attorney's right to practice is a right that cannot be lightly taken away. *Kivitz v. Securities*

and Exchange Commission, 154 U.S. App. D.C. 372, 378, 475 F.2d 956, 962 (1973). Only in clear cases of misconduct should the right to practice law be suspended. *Charlton v. Federal Trade Commission*, 177 U.S. App. D.C. 418, 543 F.2d 903, 906 (1976), citing *Ex Parte Wall*, 107 U.S. 265, 288 (1883). The great majority of states require proof in attorney disciplinary proceedings to be by clear and convincing evidence. A rule which allows the Respondent Committee to sustain its findings upon a quantum of proof less than a "reasonable ground to believe" violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

Because the procedure utilized by the Respondent Committee could be used in all administrative proceedings within Arkansas, all attorneys and the public alike have a strong interest in having this case decided by the Court.

CONCLUSION

For the foregoing reasons, the requested Writ of Certiorari should issue.

Dated: December 11, 1989.

Respectfully submitted,

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Appendix

OPINION, SUPREME COURT OF ARKANSAS

Sexton v. Arkansas Supreme Court Committee on Professional Conduct, 774 S.W.2d 114 (Ark. 1989)

Sam Sexton, Jr., Appellant,
v.
Arkansas Supreme Court Committee
on Professional Conduct, Appellee.

No. 89-73

Supreme Court of Arkansas

July 10, 1989.

PURTLE, Justice.

The Arkansas Supreme Court Committee on Professional Conduct voted to suspend the license of the appellant for a period of one year, but stayed the suspension until the appeal could be heard by this court. We affirm the action taken by the Committee and dissolve the stay.

In January, 1987, Danny Haffelder and his wife, Tina Haffelder, filed a complaint against the appellant with the Committee on Professional Conduct. Following the filing of the complaint the Committee made a determination that the appellant's license should be

suspended for one year. The charges were brought pursuant to our Model Rules of Professional Conduct which were adopted in 1985 (effective January 1, 1986). However, on appeal we reversed and remanded, holding that it was a violation of Due Process to charge a person under a rule that was not in effect at the time of the alleged violation. *Sexton v. Supreme Court Committee on Professional Conduct*, 295 Ark. 141, 747 S.W.2d 94 (1988). We stated, however, that the Committee could still proceed with the complaint under the Code of Professional Responsibility (which was in effect in 1983).

The Committee subsequently charged the appellant with violation of Disciplinary Rule 5-104(A) of the Code of Professional Responsibility. Appellant then sought prohibition, certiorari, or mandamus in which he asked this Court to order the Committee to follow the standards for lawyer discipline as adopted by the American Bar Association and to order the Committee to answer interrogatories and requests for admissions. He further asked the members of the Committee to disqualify. We declined to issue a writ and instead held that appeal was an adequate remedy. *Sexton v. Supreme Court Committee on Professional Conduct*, 297 Ark. 154A, 761 S.W.2d 602 (1988).

The Committee then reconsidered the charges pursuant to DR 5-104(A). The appellant's license was again suspended for a period of one year. That order was stayed pending appeal. It is from the Committee's

second decision that the present appeal is taken.

The complaint in this case grew out of a transaction between the appellant and the Haffelders on June 30, 1983. It is quite clear that the Haffelders believed that Sexton was still their attorney in this transaction, which was entered into following settlement of a personal injury claim. The appellant admits that his firm represented Danny Haffelder in the damage claim and that he was Haffelder's personal attorney at the time of the transaction. The basic agreement was that the Haffelders would lend Sexton (or his company) $20,000 and that they would be paid back $40,000. The repayments were to be $1,000 per month, commencing one month after the transaction. The loan was guaranteed personally by Sexton, and the proceeds from the loan were used in a corporation involved in some type of coal processing or mining. The project did not survive, and the investment was evidently lost. Either the now-defunct corporation or Sexton paid the Haffelders for a period of about one year and then stopped making the payments. The Haffelders filed a suit against the appellant for collection of the balance due under the terms of the transaction, and later filed a complaint with the Committee. Sexton paid the debt before the Committee held the hearing.

At the time the loan was made to the appellant, he agreed that the Haffelders could take the proposal to their banker or a lawyer prior to signing it. They did in

fact take a facsimile of the agreement to their banker for consultation. About a week after the first loan discussion, the appellants returned with the proposed agreement, executed it, and wrote a check for $20,000.

The central issue in this appeal concerns Disciplinary Rule 5-104(A), which states:

> A lawyer shall not enter into a business transaction with the client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure.

The appellant argues that he made a full disclosure and was thereafter under no duty to look after the interests of the Haffelders.

Both parties have correctly interpreted the rule to involve three elements: (1) a business transaction between the lawyer and the client; (2) differing interests in the transaction between the lawyer and client; and (3) the client's expectation that the lawyer will exercise his professional judgment for the client's protection. If these three elements are present, the lawyer's obligation under the rule may be fulfilled by the lawyer making a full disclosure to his client and making it clear that he no longer is looking after the client's interests in the matter. There is no disagreement that the first two elements are

present in this case. The appellant's argument is that the third element was not present because he agreed that the Haffelders could seek the advice of others in this matter. Alternatively, the appellant argues that, even if the third element was present, the client consented after "full disclosure" was made by the attorney.

In order to make a determination concerning the full disclosure issue, it is necessary for us to undertake a de novo examination of all facts surrounding this transaction. See Rule 8 of the Rules of the Court Regulating Professional Conduct. When the business transaction was first mentioned, it was the client who suggested he might want to discuss it with other parties. The appellant agreed that the Haffelders could have the contract examined by anyone they chose. The clients kept the papers about six days and talked with a person or persons at the institution where they banked. From the actions and testimony of the parties, it is obvious that the clients were relying on the appellant to protect them and look after their interests, even though they had discussed the contract with their banker. Danny Haffelder stated: "I trusted the man with everything I had." It is equally obvious that the clients felt they were going to double their money in a reasonably short time. (The rate of return under the terms of the contract far exceeded any normal investment they could have made.)

The appellant took very little affirmative action, if any, to inform his clients of the highly speculative nature

of the transaction. The only thing they knew was that Sexton was in charge and it was a "coal business." The appellant was a sophisticated, intelligent, and experienced attorney, while his clients were not at all conversant in these matters. The appellant should have revealed the facts and the economic status of the business venture he wanted his clients to invest in. He should have told his clients that the venture could fail and that, if it did, he would pay the obligation personally. He also should have told them, among other things, that the note was usurious and that he might be able to avoid full repayment if he so chose. His silence in this regard no doubt led his former clients to believe that his was a risk-free undertaking. It was not. He should have told his clients that he would not be able to pay promptly if the venture failed. Most certainly he should have expressly told them he would no longer serve as their attorney. Due to the nature of this transaction, the appellant was under a duty to affirmatively point out the details of this venture, including every circumstance and fact, to enable his clients, or former clients, to make an intelligent decision.

We also look to the action taken by the attorney after the business venture turned sour. He did not keep his word to personally make the payments to the clients, and it was necessary for the clients to file suit before the appellant paid the balance of the money. The clients eventually received all the money there were supposed to receive under the terms of the contract, but they had

to obtain the services of other counsel to recover it.

The Arizona Supreme Court, in the case of *Matter of Neville*, 147 Ariz. 106, 708 P.2d 1297 (1985), ruled that although there might not be a formal attorney-client relationship between the parties at the time of a transaction, the provisions of DR 5-104(A) still applied. The test in deciding the applicability of this disciplinary rule is whether an ordinary person would look to his lawyer as a protector rather than as an adversary. The Arizona court assumed that the lawyer informed the client that he was not acting as attorney for the client in the transaction in question. The court stated:

> We adopt the view of the cases which hold that full disclosure requires not only that the lawyer make proper disclosure of non-representation, that he also must disclose every circumstance and fact "which the client should know to make an intelligent decision concerning the wisdom of entering the agreement." [Citation omitted.] The rule is strict. The lawyer must give the client that information which he would have been obliged to give if he had been counsel rather than interested party, and the transaction must be as beneficial to the client as it would have been had the client been dealing with a stranger rather than his lawyer. [Citation omitted.] Thus, "full disclosure" requires not only a full explanation of the divergence in interest between the lawyer and the client and an

explanation about the need to seek independent legal advice, but also "a detailed explanation of risks and disadvantages to the client which flow from the agreement." [Citation omitted.]

In reviewing this case de novo from the record of the proceedings before the Committee, we have determined that the clients expected the appellant to exercise his professional judgment for their protection in this transaction. The appellant simply did not make the "full disclosure" required of him by DR 5-104(A) when he solicited the loan from his clients.

The appellant's second argument is that the Committee erred in assuming judicial functions constitutionally reserved to the courts. The right to practice law is a privilege granted by the state. The privilege cannot be denied in an arbitrary or invidiously discriminatory manner. *McKenzie v. Burris*, 255 Ark. 330, 500 S.W.2d 357 (1973). It cannot be denied in a manner inconsistent with due process of law. In the case of *In re Murchison*, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955), the United States Supreme Court stated that a fair trial by a fair tribunal is a basic requirement of due process and this rule applies to administrative agencies as well. See also *Gibson v. Berryhill*, 411 U.S. 564, 93 S.Ct. 1689, 36 L.Ed.2d 488 (1973).

The judicial power of the state of Arkansas, pursuant to Article 7, section 1, is vested in the Supreme

Court, circuit courts, and such chancery and other courts as may be created by the legislature. Article 7 goes on to establish the responsibilities and duties of various courts.

The source of power to establish the Commission is in Amendment 28, which consists of a single sentence: "The Supreme Court shall make rules regulating the practice of law and the professional conduct of attorneys at law." The Amendment is stated in mandatory language. This court is affirmatively charged with the duty of making and, by implication, of enforcing rules governing the practice of law and the conduct of lawyers. See Per Curiam dated January 19, 1972, *In re Supreme Court License Fees*, 251 Ark. 800, 483 S.W.2d 174 (1972). This per curiam stated that "[t]he duty necessarily extends to the enforcement of the rules as well as their promulgation, for without enforcement the purpose of the Amendment would fail." See also our opinion in *McKenzie v. Burris*, supra, where we stated: "Amendment 28 certainly put to rest for all time any possible question about the power of the courts to regulate the practice of law in the state. There can be no doubt that the power of the judicial department, acting through this court, is, in this respect, exclusive and supreme under this amendment, if the power was not already inherent in the courts."

The appellant in effect argues that this court has established an inferior court and named it the Arkansas Supreme Court Committee on Professional Conduct.

His argument is bottomed on our recent decision concerning "masters" and juvenile judges. See *Hutton v. Savage*, 298 Ark. 256, 769 S.W.2d 394 (1989); and *Arkansas Department of Human Services v. Templeton*, 298 Ark. 390, 769 S.W.2d 404 (1989), which held that trial courts may not set up separate courts and judges such as had been done in the case of standing masters and juvenile judges. These designated representatives purported to serve as judges. We agree that the Constitution does not permit the appointment of temporary or part-time judges by other judges.

The appellant insists that the Committee should fulfill its functions by gathering information, investigating complaints, and making recommendations to this court. He argues that the Committee has gone beyond those functions and become a court in its own right through the exercise of the power of this court in suspending the appellant's license.

In establishing this Committee, we have presumed the honesty and integrity of those appointed. Certainly we could never tolerate the denial of the right to practice law without fully affording due process to the practicing attorney. Amendment 28 did not specify the procedure or the manner in which we would regulate the practice of law. We have adopted rules and have declared that the right to appeal a decision of the Committee exists. See *Sexton v. Supreme Court Committee on Professional Conduct*, 297 Ark. 154A, 761 S.W.2d 602 (1988).

The appellant has several arguments concerning the procedural rules which should be followed by the Committee. We have adopted the Rules of Professional Conduct, which furnish a format for the presentation of evidence and the procedure to be followed by the Committee. The rules governing the procedure before the Committee are uncomplicated and are written in ordinary language. In some opinions we have made reference to various rules and proceedings by which the established courts are bound. The Committee is in the nature of an administrative agency, which is not bound by rules of the courts. However, we have not at any time attempted to require the Committee to strictly adhere to the Rules of Evidence or the Rules of Procedure. To do so would unduly complicate and probably lengthen the proceedings before the Committee. We have no hesitancy in changing the rules if it has been brought to our attention that a change would improve the discharge of the duties and functions of the Committee and would serve the best interests of the bar. See *Walker v. Supreme Court Committee on Professional Conduct*, 275 Ark. 158, 628 S.W.2d 552 (1982).

The appellant argues that the Committee erred in refusing to deem as admitted certain requested admissions and in failing to comply with Rule 52 of the Arkansas Rules of Civil Procedure. These are rules which concern proceedings in the courts. Since we review appeals from the Committee de novo, we are not

concerned so much with the procedure followed as we are with reaching the proper results. See *Davis v. Merritt*, 252 Ark. 659, 680, 480 S.W.2d 924 (1972).

We have reviewed all our prior decisions concerning the professional conduct of attorneys and have not found a case directly on point. We believe our rules of professional conduct relating to the practice of law are good ones. The fundamental purpose of these rules is to give the attorneys professional guidance and to inform them of the procedure that will be followed if disciplinary action is necessary.

In reviewing the actions of the Committee we look to the preponderance of the evidence and affirm the action taken by the Committee unless it is clearly against the preponderance of the evidence. See *Muhammed v. Supreme Court Committee on Professional Conduct*, 291 Ark. 29, 722 S.W.2d 280 (1987). We have complied with the provision of Amendment 28 and find that the Committee did not deny the appellant his constitutional or statutory rights.

We briefly discuss the appellant's argument that the Committee should have recused because some members had expressed opinions prior to the hearing. Rule 5(B)(1) of the Rules of the Court Regulating Professional Conduct states that the executive secretary "shall also advise that the attorney may request a hearing before any vote is taken by the Committee," and in the

absence of such a request the file will be sent to the Committee members who will vote by a ballot. That is exactly what occurred in this case. The mere happenstance that a trier of fact has expressed an opinion on a matter under consideration does not automatically disqualify that person from further participation. Frequently we reverse a trial judge and remand the case for another trial. Even though we may reverse a trial judge, on remand the judge is considered fair and impartial.

The argument concerning procedural due process by the courts and administrative agencies was discussed in *Withrow v. Larkin*, 421 U.S. 35, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975). The *Withrow* opinion cited with approval the case of *FTC v. Cement Institute*, 333 U.S. 683, 68 S.Ct. 793, 92 L.Ed. 1010 (1948), in which a party had demanded that the commission members disqualify themselves because, long before the Commission had filed its complaint, it had investigated the parties, and its members had testified before congressional committees concerning the legality of a pricing system. Some of the members had disclosed their opinion that the system was illegal. The Court in *FTC* stated:

> [T]he fact that the Commission had entertained such views as the result of its prior *ex parte* investigations did not necessarily mean that the minds of its members were irrevocably closed on the subject. . . .

The case of *NLRB v. Donnelly Garment Company*, 330 U.S. 219, 67 S.Ct. 756, 91 L.Ed. 854 (1947), stated:

> Certainly it is not the rule of judicial administration that, statutory requirements apart . . . a judge is disqualified from sitting in a retrial because he was reversed on earlier rulings. We find no warrant for imposing upon administrative agencies a stiffer rule, whereby examiners would be disentitled to sit because they rule strongly against a party in the first hearing.

We find nothing in the record to indicate that the members of the Committee did not consider this matter on its merits and vote in accordance with their convictions.

This case has already been before this court twice. There can be no more positive proof that we are protecting the rights of the appellant and at the same time looking to our obligation to the public. We hold that the preponderance of the evidence supports the Committee's conclusion that the appellant did not make a full disclosure as required by DR 5-104(A). Therefore, the decision of the Committee to suspend the appellant attorney's license for a period of one year is affirmed.

GLAZE, J., dissents.

GLAZE, Justice, dissenting.

The majority opinion properly adopts a standard by which an attorney's conduct or actions can be measured to determine if the attorney, who has a conflict of interest with a client, has violated Disciplinary Rule 5-104(A). In this connection, the majority adopts the rule set out in *In re Neville*, 147 Ariz. 106, 708 P.2d 1297 (1985), and I agree with this part of the majority's decision. However, I cannot agree with the court's decision that this court is constitutionally empowered to establish a committee which may serve in a judicial capacity with the authority to suspend attorneys for their professional misconduct. In my view, the majority court assumes more authority and power than it is given by the Arkansas Constitution.

The majority court assumes for itself this power to regulate *and* suspend attorneys by virtue of amendment 28 to the Arkansas Constitution, which was passed by the vote of the people in 1938 and which provides as follows:

> The Supreme Court shall make rules regulating the practice of law and the professional conduct of attorneys at law.

Clearly, this court has the authority under amendment 28, directly and impliedly, to provide all necessary and reasonable means by which attorneys' conduct may be regulated. Such authority does not, and should not,

include the authority to appoint or establish a committee with authority that conflicts with existing powers already given by the constitution to other courts.

In the case of *In re Dodrill*, 260 Ark. 223, 538 S.W.2d 549 (1976), this court, quoting from *Feldman v. State Board of Law Examiners*, 438 F.2d 699 (8th Cir. 1971), stated the following:

> The principle is firmly established that the judicial branch of government, acting through the *courts*, has exclusive jurisdiction to *admit, control and disbar* attorneys. (Emphasis added.)

The Arkansas Constitution provides that the *circuit courts shall have jurisdiction in all civil* and criminal *cases* the exclusive jurisdiction of which may not be vested by the constitution in some other court, *see* Ark. Const. art. 7, §11, and our court repeatedly has held that *proceedings involving the disbarment* of an attorney *are civil* in nature. *In re Dodrill*, 260 Ark. 223, 538 S.W.2d 549 (1976); *Weems v. Sup. Ct. Comm. on Prof. Conduct*, 257 Ark. 673, 523 S.W.2d 900 (1975); *Hurst v. Bar Rules Comm. of the State of Arkdnsas*, 202 Ark. 1101, 155 S.W.2d 697 (1941). In *Dodrill*, the court held that, in a disbarment proceeding, the trial court [circuit court] had jurisdiction with the power and authority to impose the lesser penalty, *i.e.*, to conditionally *suspend* the petitioner's [attorney's] license.

The majority would quibble that the supreme court committee would have authority to suspend an attorney's license but must defer to the circuit (or chancery) court when disbarment proceedings are involved.[1] Such a distinction runs a very fine line and has little in the way of rationale to support it. For example, no rule or authority exists that I can find which would prevent the committee from suspending an attorney indefinitely, that is, if the committee decided to impose such a sanction. However, even if the committee chose only to suspend an attorney for one or two years, the practical result is the same as a disbarment—the attorney cannot practice law. When comparing suspension and disbarment proceedings, it is also noteworthy that Ark. R. Prof. Conduct 16 treats attorneys who are disbarred or suspended in other states in the same manner when taking action against them in Arkansas.

In sum, amendment 28 contains no terms or language that endow this court with the power to appoint a committee to act in a judicial function so as to enforce the rules this court promulgates to regulate attorneys. Amendment 28 was passed in 1938, and no one even suggested this court had such power, at least until the court, by per curiam order dated March 11, 1985, adopted its present rules to regulate the conduct of

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[1] In view of Ark. Const. art 7, §11, I would take issue with this court's rules which allow the committee to file its complaint in chancery court.

attorneys. The reason for the nearly fifty-year delay between the passage of amendment 28 and the court's 1985 per curiam order was, I submit, because our constitution mandates harmoniously provide for the supreme court to regulate the professional conduct of attorneys and for the circuit courts to provide the mechanism for trying such matters. In construing and applying amendment 28 and the judicial article (particularly Ark. Const. art. 7, §11) in this manner, an attorney is also availed the panoply of civil rules of procedure which are normally allowed in civil proceedings. Under the majority's decision, such procedures are not available.

For the foregoing reasons, I would reverse the committee's decision with directions for it to file this matter in circuit court.

LETTER

Supreme Court Committee on Professional Conduct, Undated

Mr. Sam Sexton, Jr.
c/o Dale Price
Attorney at Law
211 Spring Street
Little Rock, Arkansas 72201

RE: Danny Haffelder—Complainant

Dear Mr. Sexton:

Following a hearing on the above-referenced complaint, it was the decision of a majority of the Committee that your conduct in his matter was a violation of DR5-104(A) of the Code of Professional Responsibility as amended by the Arkansas Supreme Court.

The Code provision cited states that a lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure.

As you were advised at the hearing, the Committee action is stayed pending appeal to the Supreme Court. This stay will terminate at the end of 30 days from the date of the hearing if an appeal is not perfected.

This suspension will be entered in the files of the Committee and may be considered in determining the action it might take in the event of any further complaints filed against you. Also, this suspension will be filed as a public record with the Clerk of the Arkansas Supreme Court.

Yours very truly,

The Supreme Court Committee on
Professional Conduct
By: Sam E. Gibson, Chairman

LETTER

Supreme Court Committee on Professional Conduct,
April 29, 1987

April 29, 1987

Mr. Sam Sexton
Attorney at Law
P. O. Box 1526
Fort Smith, Arkansas 72902

RE: Danny Haffelder—Complainant

Dear Mr. Sexton:

The Committee on Professional Conduct has carefully considered the complaint filed against you by Danny Haffelder and your response.

It is the decision of a majority of the Committee that your conduct in this matter was a violation of Rules 1.8 and 8.4 of the Model Rules of Professional Conduct as

amended by the Arkansas Supreme Court. The Arkansas Supreme Court has adopted these Rules as the standard of conduct for Arkansas attorneys.

These Rules state, in part, that a lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client, and that a lawyer shall not engage in conduct that is prejudicial to the administration of justice.

You are hereby suspended from the practice of law for a period of one year for this conduct, and the Committee intends to advise the complainant of the specific disciplinary action taken when this matter is concluded.

In his affidavit, Mr. Haffelder stated that he hired you to represent him following a motor vehicle accident in 1982. He alleges that after the case was settled, you suggested to him that he loan you $20,000.00 and you assured him that it would be paid back double in forty months. A promissory note signed by you, as president of R.S.C., Inc., stated that Mr. Haffelder and his wife would be paid $1,000.00 per month for forty months. Mr. Haffelder said he received about $12,000.00 of the amount, but payments came only with great difficulty. He later sued you and your company and received a judgment. Mr. Haffelder alleged that you, in your capacity as his attorney, took advantage of him and his wife.

The Rules of the Supreme Court provide you have the right to a public hearing before this Committee upon written request within 20 days. The press will be given advance notice of the hearing and identity of the attorney involved. In the absence of such a request, this suspension will be entered in the files of the Committee and may be considered in determining the action it might take in the event of any further complaints filed against you. Also, your suspension will be filed as a public record with the Clerk of the Arkansas Supreme Court.

Yours very truly,

The Supreme Court Committee on
Professional Conduct
By: Berl S. Smith, Chairman

OPINION, SUPREME COURT OF ARKANSAS

Sexton v. Supreme Court Committee on Professional Conduct, 761 S.W.2d 602 (Ark. 1988)

Sam Sexton, Jr., Petitioner
v.
Supreme Court Committee on
Professional Conduct, Respondent.

No. 88-175

Supreme Court of Arkansas

Dec. 12, 1988

DUDLEY, Justice.

Danny Haffelder filed a complaint with the Supreme Court Committee on Professional Conduct against Sam Sexton, Jr., a Fort Smith lawyer. The alleged misconduct took place in 1983 while the Code of Professional Responsibility was in effect. However, the Committee charged Sexton under the Model Rules of Professional Conduct, which were adopted in 1985, after the alleged misconduct had occurred. After a hearing, the Committee suspended Sexton's law license for one year. We reversed and remanded because Sexton was not charged under the rules in effect at the time of the alleged misconduct, but we stated that the Committee could proceed against him if he was properly charged. *Sexton v. Supreme Court Committee on Professional Conduct*, 295 Ark. 141, 747 S.W.2d 94 (1988).

The Committee then charged Sexton under DR 5-104(A) of the Code of Professional Responsibility. A hearing on the charge has been set for December 3, 1988.

Sexton, by prohibition, certiorari, or mandamus, asks us to order the Committee to follow the Standards

for Lawyer Discipline and Disability Proceedings adopted by the American Bar Association; to order the Committee to deem requests for admissions admitted; and to order certain committee members to disqualify. We decline to issue a writ.

The Rules of Professional Conduct are the substantive rules governing the bar. These substantive rules are enforced by our Committee on Professional Conduct. The Committee's procedures and substantive powers are currently governed by our Rules Regulating Professional Conduct of Attorneys at Law, adopted by Per Curiam order, 285 Ark. 488, 687 S.W.2d 118 (1985).

Prior to the 1985 changes in these Rules, the committee, by its own action, could only caution or reprimand an attorney. It could additionally proceed in circuit or chancery court to disbar an attorney. The Rules Regulating Professional Conduct then in existence provided for appeal from circuit or chancery court action, but did not mention appeal from committee action. Even so, we allowed an appeal to this Court from a committee adjudication. *See Walker v. Supreme Court of Arkansas Committee on Professional Conduct*, 275 Ark. 158, 628 S.W.2d 552 (1982). In 1985, the Committee was given the added substantive powers of issuing a warning or suspending an attorney from practicing law. Again, we did not expressly state by rule that a right of appeal to this court existed after a warning or suspension by the Committee. Nevertheless, such a right does exist. *See*

Sexton v. Supreme Court Committee on Professional Conduct, 295 Ark. 141, 747 S.W.2d 94 (1988). However, it may not be exercised in piecemeal fashion. In brief, the petitioner, Sexton, will have a right of appeal to this Court from any committee action.

The petitioner asks us by prohibition, certiorari, or mandamus to direct the Committee to comply with the American Bar Association Standards For Lawyer Discipline. A writ of prohibition is not the proper procedure in this situation, since it issues only when the lower court, or adjudicative committee, is wholly without jurisdiction. *See Miller v. Lofton, Judge*, 279 Ark. 461, 652 S.W.2d 627 (1983). The Committee clearly has jurisdiction over attorney disciplinary matters. *See Muhammed v. Arkansas Supreme Court Committee on Professional Conduct*, 291 Ark. 29, 722 S.W.2d 280 (1987). Likewise, mandamus is not the appropriate remedy. The purpose of a writ of mandamus is to enforce an established right or to compel the performance of a duty. *Gregg v. Hartwick*, 292 Ark. 528, 731 S.W.2d 766 (1987). It is not used to control the discretion of an official. Since this Court has not adopted by rule the American Bar's Standards For Lawyer Discipline, the Committee has discretion in the matter of whether it complies with the standards.

The writ of certiorari is issued to correct proceedings that are erroneous on the face of the record when there is no other adequate remedy. *Perry v. State*,

275 Ark. 170, 628 S.W.2d 304 (1982). The Committee's scheduled hearing is not erroneous on its face; thus, certiorari is not appropriate. None of these writs are issued when appeal will provide an adequate remedy.

The American Bar Association's standards are recommendations or guidelines from the Association for disciplinary proceedings. Some of the states have adopted them while others have not. *See Survey of Lawyer Disciplinary Procedures in the United States*, prepared by the American Bar Association Center for Professional Responsibility (1984). Many states, like us, have their own rules. If our rules should deprive petitioner of some constitutional right, an appeal will provide an adequate remedy, just as it did in petitioner's last appeal.

Next, the petitioner argues that we should order the Committee to deem his requests for admissions as admitted. Again, an adequate remedy for this issue will be provided by appeal. *See, e.g., B & J Byers Trucking, Inc. v. Robinson*, 281 Ark. 442, 665 S.W.2d 258 (1984).

Finally, petitioner asks us to order the committee members who participated in the original vote to suspend his license to disqualify from hearing this charge. Again, this is the type of issue which can be resolved on appeal. We regularly decide on appeal whether judges or jurors should be disqualified. *See, e.g.,*

Matthews v. Rodgers, 279 Ark. 328, 651 S.W.2d 453 (1983).

The petition is denied.

PURTLE and GLAZE, JJ., dissent.

GLAZE, Justice, dissenting.

My disagreement with the majority lies largely with how this court should deal with defects found in the court's rules that regulate proceedings concerning professional conduct of attorneys. In the proceeding now before us, it has become evident that some rather critical procedures have been omitted from this court's rules, and one of them involves the failure to provide for an appeal from a decision of the Supreme Court Committee on Professional Conduct.[1] Rather than immediately promulgating a rule to provide for an appeal, the majority seems to suggest a right of appeal is provided already because the court previously allowed such an appeal in *Walker v. Supreme Court Committee on Professional Conduct*, 275 Ark. 158, 628 S.W.2d 552 (1982). In *Walker*, no one raised the issue now before us, and I respectfully suggest the court is in error when it attempts to remedy this serious defect or void in the rules by judicial fiat.

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[1]Rule 8 provides for an appeal, but that appellate procedure is available only when the Committee elects to file a complaint against an attorney in chancery or circuit court. When that procedure is employed, either the Committee or the attorney may appeal the trial court's decision.

The majority's decision to provide, by case opinion, for an appeal in these matters leads it to establish still another rule by the same means. The majority further decides that the appellant may not exercise his right of appeal in piecemeal fashion. Again, there is no mention in the court's rules as to when an attorney can appeal because, as previously mentioned, there is no rule providing for an appeal. Actually, the court, by its opinion, has adopted a rule (position) similar to that provided in Ark.R. of App.P. 2, which requires a final order before an appeal can be taken.

In my view, this court should simply acknowledge the procedural voids that exist in its rules and promulgate rules to eliminate those problems. At the same time, the court should stay the proceedings in this case and decide those issues raised by the appellant. The appellant and the Committee could certainly use the guidance this court could afford them by the court's proper consideration and resolution of the legal issues raised here. Those unresolved issues will inevitably hover over the hearing now scheduled on December 3, 1988.

For the foregoing reasons, I would grant appellant's appeal and order a temporary stay of the proceedings below, so this court could fully resolve those questions raised in this cause.

PURTLE, J., joins this dissent.

OPINION, SUPREME COURT OF ARKANSAS

Sexton v. Supreme Court Committee on Professional Conduct, 747 S.W.2d 94 (Ark. 1988)

Sam Sexton, Jr., Appellant,
v.
Supreme Court Committee on
Professional Conduct, Appellee.

No. 87-272

Supreme Court of Arkansas

March 28, 1988

HICKMAN, Justice.

Sam Sexton, Jr., a Fort Smith lawyer, had his law license suspended for one year by the Supreme Court Committee on Professional Conduct. We must reverse the decision because Sexton was not charged with a violation of a rule of professional conduct that was in existence at the time of his conduct. The committee may proceed against Sexton if he is properly charged.

The charge arose from conduct which occurred in 1983. According to the findings of the committee, when

Sexton settled a claim for Danny Haffelder, who was injured in a motorcycle accident, Sexton suggested that Haffelder invest $20,000 in a company called Reclaimed Surface Coal Corporation, a company in which Sexton was involved. Sexton assured Haffelder he would double his money in 40 months. Sexton signed a promissory note to Haffelder for $40,000 as president of the company. Haffelder was paid about $12,000 on his investment, but had to file suit to obtain a judgment for the remaining $28,000. Discussion of the details of this matter are unnecessary to our decision.

Haffelder filed a complaint with the Supreme Court Committee on Professional Conduct. The executive secretary of the committee notified Sexton that he was charged with the violation of Rule 1.8(a) and 8.4(a) of the Model Rules of Professional Conduct. Rule 8.4(a) is a general rule of misconduct, which reads:

> It is professional misconduct for a lawyer to:
>
> > (a) violate or attempt to violate the rules of professional conduct, knowingly assist or induce another to do so, or to do so through the acts of another;

The specific rule, Rule 1.8(a), reads:

> (a) A Lawyer shall not enter into a business transaction with a client or knowingly acquire an

ownership, possessory, security or other pecuniary interest adverse to a client unless:

> (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;
>
> (2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
>
> (3) the client consents in writing thereto.

These rules were not in existence at the time of Sexton's conduct. They were adopted on December 16, 1985. *See Matter of Adoption of Model Rules of Professional Conduct*, 287 Ark. 495, 702 S.W.2d 326 (1985). At the time of Sexton's conduct, he was governed by the Code of Professional Responsibility which was adopted by our order February 23, 1970. While the rules are similar, they are not the same.

The counterpart to rule 1.8 of the Model Rules of Professional Conduct under the Code of Professional Responsibility was disciplinary rule 5-104(A), which reads:

> A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure.

The old code contained ethical considerations, which served to guide attorneys regarding what was permissible conduct and what was not. One applicable to this situation is EC5-3, which reads in part:

> A lawyer should not seek to persuade his client to permit him to invest in an undertaking of his client nor make improper use of his client to invest in an enterprise in which the lawyer is interested.

Sexton made a timely motion to dismiss the charges against him because rule 1.8 was not in effect when the conduct occurred, but the motion was overruled. The committee was wrong. Due process requires notice that an act is punishable at the time it is committed. *See In Re Inquiry Concerning a Judge*, 357 So.2d 172 (Fla. 1978). Accordingly, Sexton should have been charged under the rule in effect at the time of the alleged misconduct. *See, e.g., Kelson v. State Bar of California*, 17 Cal.3d 1, 549 P.2d 861, 130 Cal.Rptr. 29 (1976); *see also Montgomery County Bar Association v. Hect*, 456 Pa. 13, 317 A.2d 597 (1974); *Attorney Grievance Commission of Maryland v. Kerpelman*, 288 Md. 341, 420 A.2d 940 (1980). It might

not matter if the rules were substantially the same, but we find a significant difference between the old rule, 5-104(A) of the Code of Professional Responsibility, and the new rule, 1.8(a) of the Model Rules of Professional Conduct.

Sexton also argues the charge should be dismissed. We do not reach this question in view of our decision to reverse the committee's decision on notice and the charge. However, we note that in *Kelson*, *supra*, the California Supreme Court held that the adoption of new rules of professional conduct is not a bar to a proceeding against a lawyer for an alleged violation of prior rules of professional conduct.

Sexton also argues that the committee was wrong in finding that the attorney/client relationship still existed when the investment was made. Haffelder did not invest the money until June 30, 1983. However, Sexton suggested that Haffelder invest the money the day the settlement proceeds were disbursed. At that time Sexton was still in a position of trust as a lawyer, and later events transpired on the basis of a suggestion Sexton made while the lawyer/client relationship existed. We cannot say the committee was clearly wrong in finding that the relationship of attorney/client existed.

Reversed and remanded.

HAYS and GLAZE, JJ., dissent.

HAYS, Justice, dissenting.

There is nothing to be gained by remanding this case. In the first place, we review the record *de novo* and do not reverse the findings of the committee unless they are clearly erroneous. *Muhammed v. Arkansas Supreme Court Committee on Professional Conduct*, 291 Ark. 29, 722 S.W.2d 280 (1987). Moreover, this case was the subject of a lengthy hearing and a full inquiry by the committee, and neither side suggested the need for additional proof.

The charges by Mr. and Mrs. Haffelder against Mr. Sam Sexton, Jr., were defended entirely on the contention that Mr. Sexton and Mr. and Mrs. Haffelder were *at no time* in an attorney-client relationship. The hearing was focused on that issue alone. The argument that these events occurred before the effective date of the Model Rules of Professional Conduct, while mentioned in passing at the commencement of the hearing, was otherwise ignored. There was no proof whatever that the action by Mr. Sexton of which the Haffelders complained were not improper prior to the adoption of the Model Rules. Moreover, essentially the same conduct is prohibited under the Code of Professional Responsibility. See DR 5-104(A). Certainly there was no attempt by Mr. Sexton to show that he complied with *either* rule by informing the Haffelders about the transaction. There is no testimony that Mr.

Sexton met the requirement of "full disclosure" to the Haffelders as to the pros and cons of the transaction. Mr. Sexton testified that he thought it was a good investment for them and that Mr. Haffelder regarded it as "a favor" by Mr. Sexton. There is no mention of any risk involved, but it is implicit in Mr. Sexton's account of the transaction, in the form of a loan, that it was patently usurious, in that the $20,000 was to be repaid at $1,000 a month for forty months. There seems to have been no disclosure of that material fact. It is the appellant's duty to demonstrate error in the proceedings below and to present a record from which it can be determined on review that error occurred. *S.D. Leasing, Inc. v. RNF Corp.*, 278 Ark. 530, 647 S.W.2d 447 (1983); *Kimery v. Shockley*, 226 Ark. 437, 290 S.W.2d 442 (1956). This he has failed to do.

As to whether Mr. Sexton and Mr. and Mrs. Haffelder stood in an attorney-client relationship, only one conclusion is possible. The proof is overwhelming. Mrs. Haffelder, acting for her husband while he was hospitalized from his injuries, testified that she called the Sexton firm, that she spoke with Mr. Sexton and he agreed to represent them. Often thereafter she and her husband would meet with Mr. James Robb or Mr. Bennett Nolan, younger lawyers with the firm, but they always considered Mr. Sexton their lawyer and always asked first to meet with him. Mr. Haffelder's testimony corroborated Mrs. Haffelder's. While Mr. Sexton denied that he ever spoke with Mrs. Haffelder, the finding of the

committee was clearly to the contrary.

If any doubt of Mr. Sexton's status were to remain, the documentary evidence dispels it entirely. When the discovery deposition of Mrs. Nancy Clower, the opposing litigant, was taken, Mr. Sexton appeared as attorney for the Haffelder's, and it was he who did the questioning. Much of the correspondence between the Sexton firm and Mr. Hugh Hardin, attorney for the Clowers's insurance carrier, was between Mr. Sexton and Mr. Hardin. Of eleven items of correspondence flowing from Mr. Hardin, seven were addressed to Mr. Sexton, three to Mr. James Robb and none to Mr. Nolan, whom Mr. Sexton contends was "lead" counsel. In one letter to Mr. Sexton, Mr. Hardin states, "In your representation of this young man" (referring to Mr. Haffelder) and proceeds to ask for income tax records. There is correspondence between Mr. Walter Niblock, who represented Mrs. Clower individually, to the carrier, urging settlement within the policy limits, and stressing Mr. Sexton's effectiveness in trial. This letter assumes that Mr. Sexton alone is representing the Haffelders. There are several letters from Mr. Sexton proposing settlement and evidencing an intimate knowledge of the case. The settlement itself, according to Mr. Hardin's records, was reached between Mr. Hardin and Mr. Sexton. The compromise settlement agreement, a detailed document, was approved by Mr. Sexton as "attorney for the Haffelders," the settlement check of $90,000 was endorsed by Mr. Sexton, and the joint order

of dismissal of the cause with prejudice was approved by Mr. Sexton and Mr. Hardin, and it was Mr. Sexton who met with the Haffelders at the settlement conference. Lastly, it should be noted that when Mr. and Mrs. Haffelder sued Mr. Sexton some two years later, requests for admissions were served on Mr. Sexton, the first of which was a request that he admit an attorney-client relationship had existed with the Haffelders. This request was never denied.

It is true that Mr. James Robb and Mr. Bennett Nolan of the Sexton firm, testified that Mr. Sexton never represented the Haffelders, that they retained Mr. Nolan to represent them and he brought Mr. Robb into the case, and because they were younger, they were merely drawing on Mr. Sexton's experience and prestige. But even if Mr. Sexton were not expressly retained by the Haffelders, by assuming an active, high-profile role in their behalf, Mr. Sexton gave the Haffelders every right to assume that an attorney-client relationship existed. The relationship is not dependent on an express agreement, it may be implied on the part of an attorney who acts in behalf of his client in pursuance of a request by the latter. *Hirsch Bros. & Co. v. R. E. Kennington Co.*, 155 Miss. 242, 124 So. 344 (1929); 88 A.L.R. 1; Corpus Juris Secundum, Vol. 7A, §169, p. 250.

I respectfully submit on this record the committee should be affirmed.

GLAZE, J. joins this dissent.

Denial of Rehearing

OFFICE OF THE CLERK
SUPREME COURT OF THE STATE OF ARKANSAS

September 11, 1989

Dale Price
Attorney at Law
211 Spring Street
Little Rock, AR 72201

Sam Sexton III
Attorney at Law
P O Box 1526
Fort Smith AR 72902

Re: 89-73 Sam Sexton, Jr. v. Supreme Court Committee on Professional Conduct

Dear Gentlemen:

The Court made the following order in the above styled case today:

"Petition for Rehearing is denied."

Sincerely yours,

LESLIE W. STEEN, Clerk

cc: R. B. Friendlander
Supreme Court Committee on Professional Conduct

Stay of Mandate

LAW OR CHANCERY MANDATE

STATE OF ARKANSAS
In the Supreme Court

BE IT REMEMBERED. That at a term of the Supreme Court of the State of Arkansas, begun and held at the Court Room in the City of Little Rock, on the 3rd day, being the first Monday in October, A.D. 1988, amongst others were the following proceedings, to-wit:

On the 11th day of September, A.D. 1989, a day of said term

Sam Sexton, Jr., Appellant
No. 89-73 vs.
Arkansas Supreme Court Committee on Professional Conduct, Appellee.

Appeal from a decision of the Arkansas Supreme

Appellant's motion for stay of mandate is granted for 90 days pending appeal to the U. S. Supreme Court.

IN TESTIMONY, That the above is a true copy of the order of said Supreme Court, rendered in the case herein stated, I, Leslie W. Steen, Clerk of said Supreme Court, hereunto set my hand and affix the seal of said Supreme Court at my office in the city of Little Rock, this 11th day of September, A.D. 1989.

LESLIE W. STEEN, Clerk

RULES OF THE COURT REGULATING PROFESSIONAL CONDUCT OF ATTORNEYS AT LAW

Compiler's Notes. The former rules for the regulation of professional conduct of attorneys, which were adopted June 21, 1976, and became effective July 1, 1976, have probably been overruled and superseded by these rules regulating the professional conduct of attorneys adopted by Per Curiam order on March 11, 1985. See Rules 1 of these rules.

Rule 1.

SCOPE OF RULES

The following rules are for the regulation of professional conduct of attorneys at law and shall apply to all complaints against attorneys filed hereafter. Every attorney now licensed shall be a member of the Bar of this State, and subject to these rules, or those hereafter made. To the extent that former rules are in conflict, they are hereby overruled and superseded. (Adopted March 11, 1985)

Rule 2.

CANONS OF ETHICS ADOPTED —VIOLATIONS—DISCIPLINE

The Court adopts the Model Rules of Professional Conduct of the American Bar Association, as amended, as the standard of professional conduct of attorneys at law, and an attorney who violates any provision of the Model Rules, or these rules, shall be dealt with as provided herein. (Amended by Per Curiam January 21, 1986, effective January 1, 1986; Amended by Per Curiam April 27, 1987.)

Rule 3.

COMMITTEE APPOINTED—QUORUM

The present Supreme Court Committee on Professional Conduct shall continue. The Committee will consist of seven members which shall be appointed by the Court to assist the Court in enforcing these Rules. The present Committee members shall continue to serve their present terms. Five members of the Committee shall be lawyers, one from each Congressional District and one from the State at large, and shall be appointed for seven-year terms. The other two members shall not be lawyers, shall be selected from the State at large, and shall be appointed for four-year terms. The Committee

shall elect one of its members as Chairman and another as Secretary and shall adopt rules regarding its procedure. A majority shall constitute a quorum. (Adopted March 11, 1985.)

Rule 4.

COMMITTEE AUTHORIZED TO ISSUE SUMMONS AND SUBPOENAS, DISOBEDIENCE THEREOF, CONTEMPT OF COURT

The Committee shall provide for its use a seal of such design as it may deem appropriate and, in the performance of duties imposed by the Rules of this Court, and by its own regulations in aid of the Court's Rules, shall have the authority to issue summonses for any person or subpoenas for any witness, including the production of documents, books, records, or other evidence, directed to any sheriff or state police officer within this State, requiring the presence of any person or the attendance of any witness before the Committee for the purpose of testimony, or in furtherance of investigation. Such process shall be issued under the seal of the Committee and be signed by the Chairman, Secretary, or by the Executive Secretary thereof. Disobedience of any Committee order, summons or subpoena, or refusal to appear or testify shall be regarded as contempt of the Supreme Court. (Adopted March 11, 1985.)

Rule 5.

EXECUTIVE SECRETARY AUTHORIZED

(A) Executive Secretary

(1) The Committee shall have, and is hereby granted authority to employ, an Executive Secretary who shall not be a member of the Committee, and shall have no vote on any matter presented to the Committee for decision. The Executive Secretary may be paid such reasonable salary and expenses as may be deemed necessary and appropriate by the Committee, payable from funds alloted the Committee. The salary and expense shall be subject to the approval of the Court.

(2) The Executive Secretary shall serve at the will of the majority of the Committee, and shall devote his full time and effort to promptly and efficiently receive, investigate, and process complaints and perform such other duties as are required by these Rules, or by the Committee.

(B) Duties of the Executive Secretary

(1) It shall be the duty of the Executive Secretary to receive all complaints against any member of the Bar, oral and written, to interview complainants, assist them in the preparation of a detailed complaint in

affidavit form pursuant to the Rules of the Committee, and to conduct such additional investigation into the facts as may be required. The Executive Secretary shall then furnish to the attorney complained against a copy of the formal complaint and advise the attorney that he may file a written response in affidavit form with any supporting evidence desired. He shall also advise that the attorney may request a hearing before any vote is taken by the Committee and that, in the absence of such request, the file will be sent to the Committee for vote by ballot as provided in these Rules, with the attorney's right to a subsequent hearing to be preserved, should he be dissatisfied with the ballot vote. At such time as the Executive Secretary has received from the attorney a written response, or has given the attorney at least ten days in which to file a written response, he shall prepare seven copies of the complaint, the response, and exhibits, if any, and such other information, memoranda, and recommendations which he may have prepared and send a copy to each member of the Committee.

(2) Where the attorney has requested a hearing, no ballots shall be sent, and the matter shall be set for hearing to be conducted under the rules for public hearings. With all other files, the Executive Secretary shall submit to each Committee member a written ballot to be filled out and returned to the Executive Secretary. Said ballot shall contain appropriate spaces for (a) the signature of the Committee member, (b) the date, (c) the member's vote on the action to be taken on the

complaint, and (d) for additional comments, if any.

The Committee is authorized to warn (which is not considered disciplinary and which shall be confidential), to issue letters of caution or reprimand, to suspend, or to take other action as authorized by these Rules. If the majority of the Committee returns written ballots voting to take no action, the complaint shall be placed in the closed files. If the vote is to warn, an appropriate letter shall be sent to the attorney and the complainant notified. If a majority of the Committee returns written ballots to caution, reprimand, or suspend the attorney without a hearing, the attorney shall be notified of the findings and vote of the Committee, and be advised that he has the right, upon written request within twenty days, to a hearing before the Committee. The attorney shall also be advised that in the absence of a request for a hearing, such findings and order of the Committee will be entered in the files of the Committee and will be filed as a public record in the office of the Clerk of the Supreme Court. If a hearing is requested, the Chairman will be so notified, the written ballots will have no effect or force, and the hearing will be granted upon notice to the attorney.

(3) If a majority of the Committee returns written ballots voting for a formal hearing, the Chairman will be so notified, and the procedures set forth in the Rules of the Committee for formal hearings will be followed. The Committee is hereby authorized to take

action by written ballot, subject to the requirements and limitations set forth above.

(4) In the event a majority of the Committee votes to take no disciplinary action against an accused attorney or to warn the attorney, the Executive Secretary shall so notify the complainant and accused attorney and shall file a monthly report of such cases by number only as a public record in the office of the Clerk of the Supreme Court. Informal complaints upon which no action is taken need not be included in the report, except for a statement of the number received. If a majority of the Committee votes to caution, reprimand, or suspend an attorney following a formal hearing, or in the absence of a request for a hearing by the accused attorney as provided herein, then the Committee shall have the Executive Secretary notify the complainant of the specific action taken against the attorney and file a copy of the letter of caution, reprimand, or suspension as a public record in the office of the Clerk of the Supreme Court.

(5) Except for the public hearings and filings specified in these Rules, the Executive Secretary and members of the Committee shall keep confidential the activities and files of the Committee, unless it is necessary to divulge the information for disbarment suit purposes, or for release of statistical data, or if the attorney about whom an inquiry is made waives the confidentiality of the information in writing.

Nevertheless, any proceeding at which the testimony of witnesses is being taken under oath shall be open to the public. At the end of such proceedings, the Committee may hold an executive session to deliberate upon any disciplinary action to be taken. Its decision shall be announced immediately, with a statement of the votes of the individual members if the decision is not unanimous. Any letter of caution, reprimand, *or suspension* shall be made public immediately after its release to the attorney being cautioned, reprimanded, *or suspended.* Monthly filing will also be made as a matter of public record, as directed earlier in this Rule.

(C) Reinstatement

Following any period of suspension from the practice of law an attorney desiring reinstatement shall file with the Executive Secretary a verified petition requesting reinstatement and setting out the following: (a) that he or she did fully and promptly comply with Rule 11 of these rules; (b) that he or she has refrained from practicing law during the period of suspension; (c) that his or her license fee is current or has been tendered to the Clerk of the Supreme Court; (d) that he or she has fully complied with any requirements imposed by the Committee as conditions for reinstatement. Any misstatement of fact may constitute grounds for contempt or revocation of reinstatement. (Adopted March 11, 1985; Amended by Per Curiam July 13, 1987.)

Rule 6.

[EXECUTIVE SECRETARY]

The Executive Secretary may attend and, at the request of the Committee, act as counsel in presenting testimony and other evidence in the event a hearing is held by the Committee on any complaint. (Adopted March 11, 1985.)

Compiler's Notes. The bracketed heading "Executive Secretary" was inserted by the compiler.

Rule 7.

COMPLAINTS INVESTIGATED—COMMITTEE MAY FILE COURT COMPLAINTS

(A) The Committee shall investigate all complaints of professional misconduct that may be brought to its attention in the form of an affidavit, or in respect of which any member of the Committee may have information, and shall give the attorney involved an opportunity to explain or refute the charge. If the Committee finds that there is a reasonable ground to believe that the attorney has been guilty of professional misconduct, it may warn, caution, reprimand, or suspend the attorney; or with the consent of the attorney and the approval of the Arkansas Supreme Court, the attorney

may surrender his license upon the conditions agreed to by the Committee and the attorney; or it may cause a complaint in writing to be prepared which shall set forth the specific facts constituting the alleged misconduct, and serve a copy thereof on the attorney against whom the charge is made.

FILED IN EITHER CIRCUIT OR CHANCERY COURT—NOTICE OF TRIAL—TRIAL BEFORE JUDGE OR CHANCELLOR

(B) Such complaint shall be filed with the Clerk of the Circuit or Chancery Court of the county in which the accused attorney resides, or in which the alleged offense was committed; and reasonable notice of the time of trial shall be given of not less than twenty days, which trial shall be had before the Circuit Judge or Chancellor, without a jury.

PUNISHMENT IF GUILTY—DISMISSAL IF NOT

(C) If the Judge or Chancellor finds, upon the hearing before him, that the attorney has been guilty of professional misconduct, he shall reprove, reprimand, suspend, or disbar such attorney as the testimony may warrant. If the Judge or Chancellor finds that the complaint of the Committee is not sustained by the evidence, the proceedings shall be dismissed.

VOLUNTARY SURRENDER OF LICENSE

(D) No petition to this Court for Voluntary surrender of license by an attorney shall be granted until referred to the Committee on Professional Conduct and the Committee's recommendations received by this Court. (Adopted March 11, 1985.)

Rule 8.

APPEAL BY EITHER PARTY
—HEARD DE NOVO

(A) Either the Committee or the attorney defendant may appeal to the Supreme Court from the action taken by the Judge or Chancellor. On appeal, the matter shall be heard de novo upon the record made before the trial judge, and this Court shall pronounce such judgment as in its opinion should have been pronounced below.

NOTICE OF APPEAL

(B) Notice of appeal and perfection of appeal shall be in accordance with applicable statutes and Rules of this Court governing appeals in civil matters, but the order by the Circuit Judge or Chancellor shall remain effective until judgment by this Court is pronounced. If no appeal be perfected within the time allowed and in

the manner provided, the order of the Judge or Chancellor shall be final and binding on all parties.

APPEAL BY DEFENDANT
—NOTICE TO COMMITTEE

(C) Notice of appeal shall be served in writing upon the Chairman or Secretary of the Committee if the appeal be taken by the defendant attorney, and upon such attorney if the appeal be taken by the Committee. (Adopted March 11, 1985.)

Rule 9.

PRIVILEGE AND IMMUNITY

(A) All communications, complaints, testimony and evidence of any nature filed with, given to or given before the Committee, or to any of its employees and agents performing their duties, based upon a complaint charging an attorney with professional misconduct, as well as all actions thereon and activities growing therefrom, are absolutely privileged, and, except for perjury, no suit at law, civil, or criminal, predicated thereon may be instituted, nor may any suit at law, civil or criminal be filed against a member of the Committee for action taken by the member in good faith in the performance of the member's duties.

(B) The Committee is authorized to request the

appropriate prosecuting authorities to seek to obtain immunity from criminal prosecution for a reluctant witness, using procedure outlined in Act 561 of 1973; Ark. Stat. Ann. 28-531 et seq. (Repl. 1979). (Adopted March 11, 1985.)

Rule 10.

NOTIFICATION OF CRIMES

(A) When instructed by the Committee, the Executive Secretary shall notify the appropriate prosecuting attorney of any evidence of a crime presented to the Committee in connection with its investigation or hearing of the complaint.

RECORD OF LICENSED ATTORNEYS

(B) It shall be the duty of the Clerk of the Arkansas Supreme Court to maintain a public record of licensed attorneys in the State of Arkansas and a list of all attorneys no longer licensed and the reasons therefor, e.g., deceased, suspended, disbarred, surrender of license, fee delinquent, disabled, or retired. (Adopted March 11, 1985.)

Rule 11.

COMPLIANCE WITH DISCIPLINE AND NOTIFICATION OF AFFECTED PARTIES

(A) In every case in which an attorney is disbarred, suspended, or surrenders his license, the attorney shall within twenty days of the disbarment, suspension, or surrender:

(1) Notify all of his clients in writing and any counsel of record in pending matters that he has been disbarred, or suspended, or surrendered his license;

(2) In the absence of co-counsel, notify all clients to make arrangements for other representation, calling attention to any urgency in seeking the substitution of another attorney;

(3) Deliver to all clients being represented in pending matters any papers or property to which they are entitled, or notify them and co-counsel of a suitable time and place where the papers and other property may be obtained, calling attention to any urgency for obtaining the papers or other property;

(4) Refund any part of any fees paid in advance that have not been earned;

(5) File with the Court, agency, or tribunal before which any litigation is pending a copy of the notice to the opposing counsel, or adverse parties if no opposing counsel;

(6) Keep and maintain a record of the steps taken to accomplish the foregoing;

(7) File with the Clerk of the Supreme Court and the Committee a list of all other state, federal, and administrative jurisdictions to which he is licensed or admitted to practice. Upon such filing, the Clerk of the Supreme Court shall notify those entitled of the disbarment, suspension, or surrender.

(8) File an affidavit with the Committee that he has fully complied with the provisions of the order and completely performed the foregoing or a full explanation of the reasons why the provisions have not been fully complied with. Such affidavit shall also set forth the address where communications may thereafter be directed to the respondent.

(9) Failure to comply with this Rule shall subject the individual to contempt of the Supreme Court. (Adopted March 11, 1985.)

Rule 12.

LICENSE FEE PROVIDED—WHEN PAYABLE

A license fee is hereby imposed by this Court to be fixed annually upon each attorney licensed to practice law in this State, to be paid to the Clerk of this Court. The amount shall be payable January 1 of each year, and must be paid not later than March 1. Funds thus realized shall be used as ordered by the Supreme Court. (Adopted March 11, 1985.)

Rule 13.

EXPENSES OF COMMITTEE PROVIDED FOR

From the funds created under Rule 12, members of the Committee shall be entitled to receive their travel and hotel expenses, reimbursement for postage, stationery, communications, an attendance allowance, and other incidental expenses, including stenographic bills, and court costs chargeable against them. All such items shall be paid by the Clerk of this Court by check on such fund, signed by the Clerk and countersigned by the Chief Justice. Accounts must be itemized and certified by the Chairman, Secretary, or the Executive Secretary of the Committee as true and correct. (Adopted March 11, 1985.)

Rule 14.

SUSPENSION FOR FAILURE TO PAY FEE —NOTICE OF DELINQUENCY REINSTATEMENT—HOW

(A) *Suspension for Failure to Pay Fee.* Failure to timely pay the annual license fee herein provided shall automatically suspend such delinquent lawyer from the practice. Notice of delinquencies shall be given by the Clerk of this Court to the delinquent, and to the Judge of the Circuit and Chancery Courts of the district of the delinquent's residence, and a list of all delinquents shall be posted in the office of the Clerk of this Court. Where delinquency is for no more than three years, reinstatement may be had by the payment of all such delinquent dues, and a penalty of $100. (Delinquency in a given year dates from March 2 of that year.) If delinquency is for more than three years, application for reinstatement must be made on a form supplied by the Clerk and accompanied by a tender of all unpaid dues and penalty.

(B) *Reinstatement.* Any such application for reinstatement and any other application for reinstatement shall be accompanied by the payment of an application fee of $50.00. All applications for reinstatement will be referred to the State Board of Law Examiners for investigation and recommendation and

the taking of a new examination may be required by the Board. Every application for reinstatement shall be processed and investigated by the Secretary of the Board and the Board of Law Examiners is authorized to pay said Secretary a fee of $50.00 for making such investigation. (Adopted March 11, 1985.)

Rule 16.

DISBARMENT OR SUSPENSION IN OTHER STATES

No person shall be admitted to practice law in this State who has been disbarred or suspended from the practice of law in any other state, and the disbarment or suspension of any person from the practice of law in any other state shall operate as a disbarment or suspension of such person from the practice of law in this State under any license, issued to such person by this Court prior to his disbarment or suspension in such other state. Whenever any member of the Bar of this Court shall have been disbarred or suspended by judgment of any court of record held outside of this State or by any United States Court held within this State, such judgment, upon filing of an authenticated copy thereof in this Court, shall be deemed prima facie grounds for disbarment or suspension, as the case may be, of such attorney by this Court, and, unless good cause for any other action be shown, a like order shall be entered by the Court. (Adopted March 11, 1985.)

Rule 17.

CONVICTION OF FELONY OR INFAMOUS CRIME

If an attorney has been convicted of a felony or infamous crime under the laws of any State or of the United States, a charge may be made by complaint filed by the Committee with the Clerk of a Court of proper venue under these Rules. A time shall be fixed for a hearing with reasonable notice of not less than twenty days given to the accused attorney. A certified copy of the judgment of conviction of an attorney shall be conclusive evidence of his guilt of the crime for which he has been convicted, in any disciplinary proceeding instituted against him based on the conviction. The sole issue to be determined shall be whether the crime warrants discipline and, if so, the extent thereof. The attorney may not offer evidence inconsistent with he essential elements of the crime for which he was convicted. An appeal may be taken in accordance with these Rules. (Adopted March 11, 1985.)

Rule 18.

REPORTING CRIMINAL CONVICTION

All prosecuting attorneys and judges participating in or presiding over a hearing in which an attorney is convicted of, pleads guilty to, or pleads nolo contendere

to, a crime which is a Class A misdemeanor or greater offense, shall have the duty to report such conviction or plea to the Executive Secretary. (Adopted March 11, 1985.)

Rule 19.

INACTIVE STATUS

(A) *Temporary Transfer to Inactive Status.* The Committee is authorized to temporarily transfer an attorney to inactive status in the event that:

(1) The attorney has been judicially declared incompetent; or

(2) The attorney has been involuntarily committed due to incapacity or disability; or

(3) The attorney has alleged incapacity during the course of a disciplinary proceeding against him; or

(4) The attorney is found by the Committee to be cuplable of habitual drunkenness or drug use substantially affecting the attorney's fitness to practice law; or

(5) The attorney is found by the Committee to have appeared in Court while under the influence of alcohol or drugs; or

(6) The attorney is found by the Committee to be unfit to practice law due to mental infirmity whether or not he has been judicially declared incompetent.

(B) *Hearing.* The Committee may vote by ballot as provided in Rule 5, on the issue of temporary transfer to inactive status or reinstatement due to an event described in subsection (A)(1), (2), and (3) above. All other temporary, and all permanent transfers of an attorney to inactive status shall be made only after hearings initiated by the Executive Secretary or others and conducted in the same manner as other disciplinary proceedings. The Committee for good cause shown may order the respondent to submit to a medical examination by a Committee-appointed expert.

(C) No attorney shall be entitled to practice while on inactive status. Upon a transfer to inactive status, the Committee shall take steps to notify interested parties as may be appropriate under the circumstances.

(D) *Reinstatement.* The Committee may reinstate an attorney to active status upon a showing that the disability has been removed and the attorney is fit to resume the practice of law.

(E) *Waiver of Doctor-Patient Privilege.* The filing of a petition for reinstatement shall be deemed a waiver of the doctor-patient privilege regarding the disability.

Raising the defense of current mental or physical disability by one who is the subject of a disciplinary proceeding also constitutes a waiver of the doctor-patient privilege. (Adopted March 11, 1985.)

Rule 20.

JUDGES TO REPORT ATTORNEYS UNDER INFLUENCE OF ALCOHOL OR DRUGS

All trial judges have the duty to and shall report to the Committee any attorney appearing before them who, in the trial judge's opinion, is under the influence of alcohol or drugs. (Adopted March 11, 1985.)

Rule 21.

FEDERAL DISCIPLINARY HEARINGS

The Executive Secretary may act as counsel, and the Committee as the disciplinary agency, when so requested by a Federal Judge under Rule X of the Uniform Federal Rules of Disciplinary Enforcement, adopted by the United States District Courts of Arkansas on May 1, 1980. Any additional expense incurred in the processing of such a federal complaint will be paid from the funds arising from the assessments levied under Rule XI of the Uniform Federal Rules. When final action is taken upon a federal complaint, a report of that action will be made to the Federal Judge who referred the

matter, and the Committee may also furnish to the Federal Judge any other information from its files necessary to fulfill its duties as counsel. (Adopted March 11, 1985.)

Rule 22.

RULES SUPPLEMENTAL TO STATUTES

These rules shall not be deemed exclusive of, but as supplemental to the statutes of the State of Arkansas not in conflict herewith. To the extent that prior statutes are in conflict with these Rules, they are hereby superseded. (Adopted March 11, 1985.)

Supreme Court, U.S.
FILED
MAR 8 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1085

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

SAM SEXTON, JR. ..... *Petitioner*

vs.

ARKANSAS SUPREME COURT COMMITTEE
ON PROFESSIONAL CONDUCT ..... *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

Respondent disagrees with Petitioner's characterization of facts contained in the record which form the basis for his presented questions. Therefore, Respondent would submit the following:

I.

WHETHER RESPONDENT'S RULES AND PRACTICE WHICH PROVIDE FOR EVIDENTIARY SUBMISSION TO IT PRIOR TO A HEARING (AT THE ACCUSED ATTORNEY'S OPTION), OFFENDS THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION?

II.

WHETHER THE RESPONDENT COMMITTEE MAY SUSPEND AN ATTORNEY'S LICENSE UPON A FINDING OF VIOLATION OF A DISCIPLINARY RULE PURSUANT TO A "PREPONDERANCE OF THE EVIDENCE" STANDARD WITHOUT VIOLATING THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

No. _____

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ARKANSAS SUPREME COURT COMMITTEE
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ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

On January 23, 1987, Respondent Committee charged Petitioner with violation of Rules 1.8 and 8.4 of the Model Rules of Professional Conduct as adopted by the Arkansas Supreme Court and in effect on that date. The charge was brought pursuant to a complaint filed with Respondent Committee. Subsequent to the filing of the complaint, Petitioner filed a response, but requested no hearing. Pursuant to Rule 5(B)(1) & (2), Petitioner had been furnished with a copy of the formal complaint and advised he was entitled to file a written response in affidavit form with any supporting evidence desired. Petitioner was also advised that a hearing

could be requested before any vote was taken by the Committee and that, in the absence of such request, the file would be sent to the Committee for vote by ballot as provided in the Rules of the Arkansas Supreme Court Regulating Professional Conduct of Attorneys at Law ("Rules"). Petitioner was also notified that should he be dissatisfied with the ballot vote, his right to a subsequent hearing would be preserved. Petitioner requested no hearing, but instead submitted a response to the Committee. Copies of the complaint, response and a synopsis of both were sent to individual Committee members along with paper ballots. The individual members forwarded the completed ballots back to the executive secretary of the Committee who compiled the results. After learning that the Committee had voted to suspend his license for a one-year period, Petitioner Sexton requested a public hearing which was held August 29, 1987. After that de novo hearing, the Committee voted to suspend Petitioner's license. That decision was appealed by Petitioner to the Arkansas Supreme Court for its de novo review and on March 28, 1988, that Court reversed and remanded the action of the Committee, stating that Petitioner could only be charged with violating the Code of Professional Responsibility, which was in effect at the time he committed the alleged offense — in 1983. *Sexton v. Supreme Court Committee on Professional Conduct*, 295 Ark. 141, 747 S.W.2d 94 (1988) (Sexton I). Petitioner was then charged with violation of Disciplinary Rule 5-104(A) of the Code of Professional Responsibility ("DR 5-104(A)") and the Committee voted to suspend his license for one year after hearing two days of testimony, on December 3, 1988 and February 11, 1989. Petitioner appealed this final decision to the Arkansas Supreme Court. As noted in the Petition for Writ of Certiorari, *between* the first and final decisions of the Arkansas Supreme Court, Petitioner filed a "Petition for Prohibitory and Mandatory Relief" which was denied on the basis that all issues presented therein could be raised on appeal. *Sexton v. Supreme Court Committee on Professional Conduct*, 297 Ark.

154-A, 761 S.W.2d 602 (1988) (Sexton II).

In its decision dated July 10, 1989, the Arkansas Supreme Court held Petitioner failed to comply with the terms of DR 5-104(A) and upheld the decison of the Committee to suspend Petitioner's law license to practice in state courts for a period of one year. *Sexton v. Supreme Court Committee on Professional Conduct*, 299 Ark. 439, 774 S.W.2d 114 (1989) (Sexton III).

On July 28, 1989, Petitioner filed a Petition for Rehearing with the Arkansas Supreme Court and a Motion for Stay of Mandate pending his application for certiorari to this Court. The Arkansas Supreme Court denied the Petition for Rehearing on September 11, 1989, and granted Petitioner's Motion to Stay the Mandate pending his Petition for Writ of Certiorari.

This Response to Petitioner's Petition for Writ of Certiorari is now submitted.

Respondent notes that there are several misleading statements made by Petitioner in his Statement of the Case.

First, the rules of Respondent Committee do not require the Committee to vote to take action against an attorney accused of rule violations *prior* to holding a hearing. Instead, Rule 5(B)(1) & (2) provide that an accused attorney may request a hearing before any vote is taken by the Committee and that when such a request has been made, no ballots shall be sent. Rather, a public hearing shall be held in accordance with the Committee rules.

Further, although Rule 7(A) provides that if the Committee finds there is "a reasonable ground" to believe that the attorney has been guilty of misconduct it may take disciplinary action, this Rule was not applied in any of Petitioner's hearings before the Committee and/or the Arkansas Supreme

Court. Rather, those bodies made determinations based upon a "preponderance of the evidence" standard. This matter will be more fully discussed in the argument portion of this Response.

Finally, although Petitioner is correct that no provision is made in the Rules for appeal, prior to the original complaint being filed against a Petitioner with the Committee, the Arkansas Supreme Court had certainly allowed appeals to it from a Committee adjudication. *See Walker v. Supreme Court Committee on Professional Conduct*, 275 Ark. 158, 628 S.W.2d 552 (1982). That Court expressly declared a right to appeal exists in *Sexton v. Supreme Court Committee on Professional Conduct*, 295 Ark. 141, 747 S.W.2d 94 (1988).

REASONS FOR DENYING THE WRIT

I.

RESPONDENT COMMITTEE DID NOT VIOLATE PETITIONER'S DUE PROCESS RIGHTS BY SUBMITTING THE CASE FOR DISCIPLINARY RULING PRIOR TO A HEARING AS THAT WAS PETITIONER'S CHOICE.

Contrary to Petitioner's assertion, his petition presents no issues of significance to another attorney involved in disciplinary proceedings. As stated, Rules 5(B)(1) & (2), (as found at Appendix Pg. 44 of the Petition), provide that any accused attorney may request a hearing before a vote is taken by the Committee. In the absence of such a request, the file is sent to the Committee for vote by ballot. Nothing in the mentioned procedure precludes an attorney from a right to a subsequent hearing should he/she be dissatisfied with the ballot vote. Where an attorney has initially requested a hearing, no ballots are sent and the matter is set for public hearing immediately.

In this case, Petitioner did not request a hearing initially, but instead chose to submit a written response. That written response was forwarded to members of the Committee who proceeded to vote, by paper ballot, on whether violation of ethical rules had occurred and subsequently, a sanction to be imposed.

While this Court has recognized *In Re Ruffalo*, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968), that the disbarment of an attorney is a punishment or penalty, it has only stated that such proceedings are quasi-criminal in nature. *Id.* at 550. Accordingly, this Court has held that an accused attorney is entitled to procedural due process. The *Ruffalo* holding has been adopted and applied in the *Sexton* trilogy of cases. *See*

Sexton III, at 299 Ark. 439, 774 S.W.2d 114 (1989), where the Arkansas Supreme Court stated:

> Certainly, we could never tolerate denial of the right to practice law without fully affording due process to the practicing attorney.

Id. at 446.

In rejecting Petitioner's argument that the Committee should have recused itself from hearing any further evidence as to his case because some members had expressed opinions prior to the hearing, by their ballot vote, the Arkansas Supreme Court noted that the rules of the Committee had been followed in every respect. It stated:

> The mere happenstance that a trier of fact has expressed an opinion on a matter under consideration does not automatically disqualify that person from further participation. Frequently we reverse a trial judge and remand the case for another trial. Even though we may reverse a trial judge, on remand the judge is considered fair and impartial.

Id. at 448.

Also, the Arkansas Supreme Court discussed several of the cases cited by Petitioner as allegedly supportive of his position that because a hearing examiner or judge sat as a factfinder at a previous stage, he or she should be disentitled to sit in any subsequent stage just because they ruled against a party in the first hearing of the matter. The Arkansas Supreme Court distinguished those cases cited by Petitioner and Respondent goes further to distinguish these same cases cited by Petitioner in his first point.

Of course, Respondent does not deny that procedural due process applies to attorney disciplinary proceedings.

However, attorney disciplinary proceedings are analogous in no way to the situations presented in *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973) or its predecessor, *Morrisey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). In *Gagnon, supra*, this Court held that it was unreasonable and violative of due process to have parole officer (Gagnon) or probation officer (Morrisey) sit as tribunals to make determinations of whether reasonable grounds existed for revocation of parole and/or probation. This Court determined that such a finding should be made by someone not directly involved in the revocation process, as were parole and probation officers, by virtue of their roles and functions.

Certainly, in attorney disciplinary proceedings, no issue of the loss of freedom or liberty is presented. This fact alone takes this type of cases out of the scope of *Gagnon, supra*, and *Morrisey, supra*. Additionally, Respondent Committee does not act, as do parole and probation officers, directly to do initiate investigations concerning an accused, recommend whether proceedings be instituted against an accused and then subsequently sit as a tribunal over that matter. Rather, Respondent Committee responds to complaints filed by the public. Any independent investigation is accomplished by its executive secretary and evidentiary matters are presented to Committee members in a balanced and impartial manner. Thus, the constitutional flaw found in the *Gagnon* and *Morrisey* decisions is not present here. Rather, the situation posed in this case is much more similar to *Withrow v. Larkin*, 421 U.S. 35, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975), where a physician's license was at issue. There, this Court stated:

> The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in

> those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies in human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.

Id. at 47.

Further, this Court noted that similar claims had been squarely rejected in its previous decisions. For instance, in *FTC v. Cement Institute*, 333 U.S. 683, 68 S.Ct. 793, 92 L.Ed.2d 1010 (1948), it was held that no decision of this [the United States Supreme] Court would require us to hold that it would be a violation of procedural due process for a judge to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law. In fact, judges frequently try the same case more than once and decide identical issues the second time, although these issues involve questions both of law and fact. *Id.* at 702-703.

Also cited with approval by the Arkansas Supreme Court in *Sexton III*, was *NLRB v. Donnelly Garment Company*, 330 U.S. 219, 236-237, 67 S.Ct. 756, 91 L.Ed. 854 (1947):

> Certainly, it's not the rule of judicial administration that . . . a judge is disqualified from sitting in a retrial because he was reversed on earlier rulings. We find no warrant for imposing upon administrative agency a stiffer rule, whereby examiners would be disentitled to sit because they ruled strongly against a party in the first hearing.

> Applying these precedents in *Withrow, supra*, this Court found no specific foundation had been presented for suspecting that the [examining board for physicians] had

> been prejudiced by its investigation or would be disabled from hearing and deciding on the basis of the evidence to be presented at [a] contested hearing. The mere exposure to evidence presented in non-adversary investigative procedures is insufficient in itself to impugn the fairness of the board members at a later adversary hearing.

Sexton III at 448.

While the facts of *Withrow* are similar to those presented in this case, here Petitioner cannot show that any evidence was presented to the deciding tribunal that did not contain whatever arguments, by way of written response and affidavits, he wished to make on his own behalf. Nor can he show he was not (1) given notice of the complainant's position, (2) allowed discovery, (3) allowed to present testimony at hearing, or (4) cross-examine witnesses. Indeed, Petitioner was accorded much more due process than the physician in *Withrow*.

Simply, this Court has dealt squarely with Petitioner's first argument previously in *Withrow* and Petitioner presents no reason to change that ruling based on the record of that case. In order for this Court to grant certiorari in this matter, Petitioner has to show that the factual issue of whether the Committee members were automatically biased by having reviewed a complaint and response initially and later holding a public hearing on the issue of his violation of ethical rules, is significant enough to the body of federal law to warrant this Court's review.

No conflict among the circuit courts of appeals is presented, no radical departure from precedent by the Arkansas Supreme Court has been presented and no important question under the Constitution of the United States as is required by 28 U.S.C. §1254(1) is present here. All procedural due process elements have been accorded Petitioner and the Petition for Writ of Certiorari should be denied.

Plainly the Rules do not provide that only after an adverse ruling may an accused attorney request a public hearing. Moreover, the recitation of facts in *Sexton III* shows that Petitioner did not initially request any hearing, but rather, voluntarily chose to submit his case by way of response. Only after he learned of an adverse ruling by the Committee did he exercise his right to have a hearing.

Finally, Petitioner vaguely asserts facial unconstitutionality of the Rules of the Court Regulating Professional Conduct of Attorneys at Law by stating those rules do not require the Committee make available to the accused attorney results of its investigation, memoranda submitted by the executive secretary or any other material except the affidavit of the complainant. Petitioner was permitted full discovery in this case, as the record reflects.

Petitioner's first point is totally without merit and certiorari should be denied as to his first point.

II.

RESPONDENT COMMITTEE UTILIZED A "PREPONDERANCE OF THE EVIDENCE" STANDARD IN DETERMINING PETITIONER'S CASE AND THE ARKANSAS SUPREME COURT UTILIZED THIS STANDARD IN ITS DE NOVO REVIEW OF PETITIONER'S CASE.

It is difficult to discern the nature of all Petitioner's arguments in his second point. Apparently, he contends that because the Arkansas Supreme Court had not rendered a decision prior to 1983 interpreting the "full disclosure" provision of DR 5-104(A), that his due process rights were violated because he did not have notice of what conduct was prohibited. Additionally, Petitioner contends that Rule 7(a) of

the Arkansas Supreme Court Regulating Professional Conduct of Attorneys at Law violates his due process rights because it only provides that the Committee find a "reasonable ground to believe" that the attorney has committed an ethical violation.

Petitioner's arguments are totally without merit. Just because the Arkansas Supreme Court had never had occasion to interpret the meaning of the "full disclosure" provision of DR 5-104(a) prior to the decision in his case, does not mean that there was any "retroactive" application of its judicial construction. Carried to its logical conclusion, Petitioner's argument would preclude a court from considering precedential decisions rendered after the facts occurring in any given case. Such a conclusion is ridiculous.

Plus, Petitioner was charged with knowledge of rules applicable to his law license, in 1983.

The Arkansas Supreme Court merely relied on *In Re Neville*, 147 Ariz. 106, 708 P.2d 1297 (1985), as persuasive in interpreting the provisions of DR 5-104(a). That Arizona case is not precedent in Arkansas, but since the Arkansas Supreme Court had never construed the rule, it was within that court's prerogative to rely on other jurisdictions.

Many cases, other than *Neville, supra*, which was decided in 1985, stand for the proposition that merely advising a client to seek outside counsel concerning a business transaction is not sufficient to meet the full disclosure requirement of DR 5-104(a). For instance, in *In Re Bartlett*, 283 Or. 487, 584 P.2d 296 (1978), cited by Petitioner, the Supreme Court of Oregon held that the failure to advise clients to seek independent *legal counsel* with respect to the purchase of a duplex in which the lawyer held an interest and the transfer of the client's interest in that duplex without the consent of the

receiver warranted suspension of that attorney for six months. The Supreme Court of Oregon noted that there was "no record" as to whether or not the accused made a "full disclosure preceding the [clients] consent." *Id.* at 300. In *Matter of Kali*, 124 Ariz. 592, 606 P.2d 808 (1980), the Supreme Court of Arizona upheld the suspension of Mr. Kali's license for entering into a business relationship with a client without advising the client to seek outside counsel. The only outside advice received by the client came from an accountant who had been retained by the attorney and who had no independent relationship with the client.

Numerous cases decided prior to Petitioner's entry into a business transaction with a client in 1983, had been decided (and the decisions published) which held that merely advising a client to seek outside counsel concerning a transaction is insufficient to provide "full disclosure" as is contemplated in DR 5-104(A). Certainly, numerous cases have been decided *after 1983 holding the same. See In Re Neville, supra; In Re Richard V. Watson*, 482 N.E.2d 262 (Ind. 1985); *In Re O'Byrne*, 298 Or. 535, 694 P.2d 955 (1985); *In Re Goldstein*, 103 Ill.2d 123, 468 N.E.2d 959 (Ill. 1984); *In Re Pyatt*, 312 S.E.2d 553 (S.C. 1984).

Additionally, Petitioner asserts that the failure to enter findings of fact and conclusions of law by Respondent Committee violates his due process rights, citing *Wolff v. McDonnell*, 418 U.S. 539, 563, 94 S.Ct. 2693, 41 L.Ed.2d 935 (1974) for the proposition that "due process" requires the factfinder to state the facts upon which its decision is founded and to state the reasons or conclusions of law which support the action taken.

Petitioner has not been convicted of a felony in this case and the panoply of constitutional rights does not attach to the proceeding which resulted in his suspension. Even were the lack of entry of findings and conclusions of law found to be

error, that error is harmless and/or has been cured by the specific, thorough and meticulous factfinding engaged in by the Arkansas Supreme Court in its de novo review of the allegations against Petitioner. *See Sexton III*, pages 441-444.

Specifically, the Arkansas Supreme Court stated:

> In reviewing this case de novo from the record of the proceedings before the Committee, we have determined that the clients expected the appellant [petitioner] to exercise his professional judgment for their protection in this transaction. The appellant [petitioner] simply did not make the "full disclosure" required of him by DR 5-104(A) when he solicited the loan from his clients.

Finally, Petitioner submits that rules which allow the Respondent Committee to sustain findings upon a quantum of proof *less* than a "reasonable ground to believe" violate the due process clause of the Fourteenth Amendment.

Respondent assumes Petitioner means to state that a quantum of proof which is "a reasonable ground to believe" violates the due process clause. However, his argument is irrelevant as the standard of proof applied in each and every proceeding before the Committee and the Arkansas Supreme Court concerning Petitioner a "preponderance of the evidence" standard was applied in determining whether violation of ethical rules had occurred.

In a lengthy discussion in *Muhammed v. Arkansas Supreme Court Committee on Professional Conduct*, 291 Ark. 29, 722 S.W.2d 280 (1987), the Arkansas Supreme Court determined that the proper standard of review in a case appealed to it from the Respondent Committee was whether the findings below were clearly erroneous or clearly against the

preponderance of the evidence. *Id.* at 35. The Arkansas Supreme Court held at 36:

> In *Walker v. Supreme Court of Arkansas Committee on Professional Conduct*, 275 Ark. 158, 628 S.W.2d 552 (1982), we had before us an appeal from discipline administered directly by our Committee. *Although not explicitly, we apparently applied the same standard of review we had applied in the reviews of court decisions.* We held the findings of the Committee to be supported by a preponderance of the evidence and said: 'the findings of the Committee, in this respect [that the appellant had violated the code] are not contrary to the weight of the evidence and must be affirmed,' citing *Hurst v. Bar Rules Committee of the State of Arkansas*, 202 Ark. 1101, 155 S.W.2d 697 (1941). (Emphasis added.)

At page 447 of *Sexton III*, from which this Petition is taken, the Arkansas Supreme Court held:

> In reviewing the actions of the Committee we look to the preponderance of the evidence and affirm the action taken by the Committee unless it is clearly against the preponderance of the evidence. (Citation omitted.)

The arguments of Petitioner in his second point are all without merit, lacking foundation in law or the facts presented in this case.

Certainly, Petitioner does not assert the rights of all attorneys within the State of Arkansas as he would have this Court believe. Indeed, he does not even specifically relate to this Court how the actual implementation of the Rules of Respondent Committee or the de novo review of his case by the Arkansas Supreme Court deprives him of any recognized due process rights.

Facially, Petitioner's claims do not fit within any of the traditional areas meriting review by this Court. His case presents no "important question under the Constitution of the United States" as is required to gain the attention of this Court.

CONCLUSION

For all the foregoing reasons and based upon the foregoing precedents, the Petition for Writ of Certiorari filed by Petitioner should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, R. B. Friedlander, Solicitor General, do hereby certify that I have served the foregoing, by mailing a copy of same, U.S. Mail, postage prepaid thereon to the Honorable Dale Price, Attorney at Law, 211 Spring Street, Little Rock, Arkansas 72201 on this 8th day of March, 1990.

/s/ R. B. Friedlander